No. 80-1215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SELCO SUPPLY COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE PETITIONER IN REPLY

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IN THE

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BRIEF FOR THE PETITIONER IN REPLY

This is a simple case of procedural injustice, injustice that can be simply cured. Petitioner Selco Supply Company has been denied its day in court by a decision of the Tenth Circuit that the filing of a motion to reconsider a final order of the Environmental Protection Agency ("EPA") does not toll the period within which a notice of appeal of that order must be sought. As Petitioner previously has noted, this ruling flies in the face of contrary holdings of this Court and the other circuits. *See* Pet. at 5-6. Ever since the leading case of *Outland* v. *CAB*, 284 F.2d 224 (D.C. Cir. 1960), it has been a fundamental principle of administrative law that the filing of a motion for reconsideration of an agency order tolls the time for filing a petition for review. Yet the Tenth Circuit justified its departure from this general rule only by an unreasoned conclusion that EPA orders should be "resolved" more quickly than other administrative actions. *See* Pet. App. A at 3a-4a.

Besides denying Petitioner due process in this case, the Tenth Circuit's action leaves in doubt the time period for filing an appeal from any federal agency order. The lower court's opinion gives no guidance as to which other proceedings require such rapid resolution that the time for appeal is not tolled by a motion for reconsideration. It follows that the Tenth Circuit's exception to *Outland* will quickly swallow the rule. Rather than risk forfeiting their appeal, parties will return to the practice of filing a "protective" notice of appeal in all cases in which a reconsideration motion is pending. The consequence will be added expense to the parties and added burden to the courts. Only lawyers will benefit.

The Government attempts to suggest that this case is not appropriate for review by engaging in a torturous and misleading description of the agency proceedings below. However, while the circumstances of the EPA enforcement action may be relevant to a decision on the merits of Petitioner's defense, they are irrelevant to the simple jurisdictional question before this Court—whether a motion for reconsideration tolls the time within which a notice of appeal must be filed.

When the Government actually addresses the Tenth Circuit's holding, it fails to offer any valid reason why the Court should not grant this petition. First and most important, for example, the Government does not explain why the general rule of *Outland* should not apply in this case. It merely restates the conclusory position of the Tenth Circuit, and somewhat tentatively at that, arguing that "[i]t is not apparent that the principle of [*Outland* and its progeny] applies to cases under FIFRA, in which the court of appeals perceived a particular congressional concern for prompt resolution of disputes." Resp. at 8. But, as Petitioner has indicated elsewhere, the court of appeals cited no authority to indicate any such "particular congressional concern." *See* Pet. at 6. Not surprisingly, the government cannot do so either.

Perhaps recognizing that it cannot defend the Tenth Circuit's exception to *Outland*, the Government quickly offers a second argument against review of this case. According to the Government, recent changes in EPA's rules of procedure leave the lower court's holding without "general importance warranting review." Resp. at 9. But this argument is even more lacking than the first. To begin with, any such after-the-fact rule changes would not remedy the previous violation of Petitioner's due process rights. In any event, however, the Government is incorrect, for the EPA amendments are not relevant here. The rule cited by the Government states only that the effective date of final orders will not be stayed pending action on motions for reconsideration unless so ordered by the Administrator. *See* 40 C.F.R. § 22.32 (1980). However, the issuance or denial of a stay does not bear any relationship to the federal jurisdictional question of when an agency order is final for purposes of appellate review. Even if no stay is granted, it is not appropriate for a party to be forced to file a "protective" notice of appeal while a motion for reconsideration is still pending.*

Finally, the Government suggests that even if the Tenth Circuit erred, and even if the amendments to the EPA rules are irrelevant, the instant petition should be denied because Petitioner has not been prejudiced. The Government bases this argument on its claim that the Regional Administrator did not err in his treatment of the complaint against Petitioner. Resp. at 9-10. But this theory is wrong on its face; it is difficult to conceive of

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* It also should be noted that, contrary to the suggestion of the Government, *see* Resp. at 8-9, EPA's procedure with respect to stays is basically the same under both the current rules and the rules as they existed at the time this case was before the Agency. *Compare* 40 C.F.R. § 22.32 (1980) *with* 40 C.F.R. § 168.70 (1979). In an enforcement proceeding such as this one, for example, under either rule a party denied a stay would pay its fine while continuing to challenge the Administrator's decision through a motion for reconsideration.

any more serious prejudice than that resulting from denial of a day in court. The Government essentially is suggesting that the Court should accept the Government's own position on the merits of this case, even though Petitioner never has had the opportunity to present its defense. In other words, the Government is asking this Court to prejudice Petitioner even further. Moreover, it implicitly is asking this Court to leave standing a poor decision of the Tenth Circuit that threatens to increase substantially the administrative burdens on the courts of appeal.

As noted at the outset of this brief, the Tenth Circuit's error can be cured easily—and without oral argument. The Court need only remand the case to the Tenth Circuit with instructions to hear Petitioner's appeal pursuant to *Outland*. This simple action at long last would give Petitioner the opportunity to have a hearing on the underlying substantive issues in this case. Alternatively, Petitioner respectfully requests that the Court grant the petition for certiorari and hear argument in this case.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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